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Item 3 of the provisional agenda

CONSIDERATION OF THE POSSIBLE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

Note by the UNCTAD secretariat

The attached document */ has been prepared for the eighth session of the Joint Intergovernmental Group of Experts.

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CONSIDERATION OF THE POSSIBLE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

Note by the Secretariats of IMO and UNCTAD

Introduction

To facilitate the work of the Joint Intergovernmental Group of Experts, a revised set of draft articles for a convention on arrest of ships has been prepared by the two Secretariats, taking account of the discussions at the seventh session of the Joint Group.

REVISED DRAFT ARTICLES FOR A CONVENTION ON ARREST OF SHIPS

Article 1
Definitions

(1) "Maritime claim" means any claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or out of a mortgage or an "hypothèque" or a registrable charge of the same nature on any ship, or out of salvage operations relating to any ship, such as any claim in respect of:

(a) physical loss or damage caused by the operation of the ship other than loss of or damage to cargo, containers and passengers' effects carried on the ship; (1993 MLM Convention, article 4 (1) (e));

(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship; (1993 MLM Convention, article 4 (1) (b));

(c) salvage operations or any salvage agreement;

(d) liability to pay compensation or other remuneration in respect of the removal or attempted removal of a threat of damage, or of preventive measures or similar operations, whether or not arising under any international convention, or any enactment or agreement;

(e) costs or expenses relating to the raising, removal, recovery or destruction of the wreck of the ship or its cargo;

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

(g) any agreement relating to the carriage of goods or passengers in the ship, whether contained in a charter party or otherwise;

(h) loss of or damage to or in connection with goods (including luggage) carried in the ship;

(i) general average;

(j) towage;

(k) pilotage;[1]

(l) goods, materials, provisions, bunkers, equipment (including containers) or services supplied to the ship for its operation or maintenance;

(m) construction, repair, converting or equipping of the ship;

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[1] It was suggested that in view of the inclusion of "pilotage dues" in subparagraph (n) of this article, this subparagraph could be repetitive.

(n) port, canal, and other waterway dues and pilotage dues; (1993 MLM Convention, article 4 (1) (d));

(o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf; (1993 MLM Convention, article 4 (1) (a));

(p) disbursements made in respect of the ship, by or on behalf of the master, owner, demise or other charterer or agent;

(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;

(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

(s) any dispute as to ownership or possession of the ship;

(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(u) a mortgage or an "hypothèque" or a registrable charge of the same nature on the ship;

(v) any dispute arising out of a contract for the sale of the ship.

(2) "Arrest" means any detention, or restriction on removal, of a ship by order of a Court to secure a maritime claim when at the time of such detention or restriction that ship is physically within the jurisdiction of the State where the order has been made.

"Arrest" includes "attachment" or other conservatory measures, but does not include measures taken in execution or satisfaction of an enforceable judgement or arbitral award.

(3) "Person" includes individuals, partnerships, unincorporated associations and bodies corporate, governments, their departments and public authorities.

(4) "Claimant" means any person asserting a maritime claim.

(5) "Court" means any competent judicial authority of a State.

Article 2
Powers of arrest

(1) A ship may be arrested or released from arrest only by or under the authority of a Court of the State in which the arrest is demanded or has been effected.

(2) A ship may be arrested in respect of a maritime claim but in respect of no other claim.

(3) A ship may be arrested even though it is ready to sail or is sailing.

(4) A ship may be arrested for the purpose of obtaining security notwithstanding that by virtue of a jurisdiction clause, arbitration clause or choice of law clause in any relevant contract the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

(5) Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest is demanded or has been effected.

Article 3
Exercise of right of arrest

(1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

Alternative 1:

[(a) the claim is secured by a maritime lien and is within any of the following categories (1993 MLM Convention, article 4 (1)):

(i) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf,

(ii) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship,

(iii) reward for the salvage of the ship,

(iv) port, canal, and other waterway dues and pilotage dues,

(v) physical loss or damage caused by the operation of the ship other than loss of or damage to cargo, containers and passengers' effects carried on the ship.] or

Alternative 2:

[(a) the claim is secured by a maritime lien.][2]

Alternative 3:

This alternative requires keeping the text of the paragraph 1(a) of alternative 1 together with a new sub-paragraph (b) which would read as follows:

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[2] Proposal by the delegation of the United States of America. For discussion on the three alternatives see the report on the work of the Sessional Group, document JIGE (VII)/3 (TD/B/CN.4/GE.2/3-LEG/MLM/30), para. 42.

[(b) the claim is secured by a maritime lien granted by the law of the State where the arrest is requested pursuant to the provisions of article 6 of the International Convention on Maritime Liens and Mortgages, 1993;][3]

If this alternative is adopted the following subparagraphs (b), (c) and (d) will accordingly be re-ordered as (c), (d) and (e):

(b) the claim is based upon a registered mortgage or a registered "hypothèque" or a registered charge of the same nature; or

(c) the claim is related to ownership or possession of the ship; or

(d) the claim is not covered by (a), (b) or (c) above and if:

(i) the person who owned the ship at the time when the maritime claim arose is personally liable for the claim and is owner of the ship when the arrest is effected, or

(ii) the demise charterer of the ship is personally liable for the claim and is demise charterer or owner of the ship when the arrest is effected.

(2) Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is personally liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this article, the arrest of a ship which is not owned by the person allegedly liable for the claim shall be permissible only if, under the law of the State where the arrest is demanded, a judgement in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4
Release from arrest

(1) A ship which has been arrested shall be released when sufficient security has been furnished in a satisfactory form.

(2) In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the ship.

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[3] Proposal by the Chairman of the Informal Group on consideration of national maritime liens.

(3) Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

(4) (a) If a ship has been arrested in a non-party State and is not released although security has been given in a State Party, that security shall be ordered released on application to the Court in the State Party save in exceptional cases where it would be unjust to do so.

(b) If in a non-party State the ship is released upon satisfactory security being provided, any security given in a State Party shall be ordered released to the extent that the total amount of security given in the two States exceeds:

(i) the claim for which the ship has been arrested, or

(ii) the value of the ship,

whichever is the lower.

Such release shall, however, not be ordered unless the security given in the non-party State will actually be available to the claimant and will be freely transferable.

(5) Where pursuant to paragraph (1) of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 5
Right of rearrest and multiple arrest

Alternative 1:

(1) Where in any State a ship has already been arrested and released or security in respect of that ship has already been given to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate, provided that the aggregate amount of security may not exceed the value of the ship; or

(b) the person who has already given the security is not, or is unlikely to be, able to fulfil some or all of his obligations[; or

(c) the ship arrested or the security previously given was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release].

(2) Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate; or

(b) the provisions of paragraph (1) (b) or (c) of this article are applicable.

(3) "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.

Alternative 2:

[(1) Where in any State a ship has already been arrested and released or security in respect of that ship has already been given to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim, unless there has been fraud or material misrepresentation in connection with the release or the posting of the security.

(2) Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless the nature or the amount of the security already obtained in respect of the same claim is inadequate.

(3) "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.][4]

Article 6
Protection of owners and demise charterers of arrested ships

(1) The court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and obtained.

(2) The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and obtained.

(3) The liability, if any, of the claimant in accordance with paragraph (2) of this article shall be determined by application of the law of the State where the arrest was effected.

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[4] Proposal by delegations of the United States of America, Liberia and the Republic of Korea.

(4) If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph (2) of this article may be stayed pending that decision.

(5) Where pursuant to paragraph (1) of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 7
Jurisdiction on the merits of the case

(1) The Courts of the State in which an arrest has been effected or security given to prevent arrest or obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the Parties validly agree or have agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

(2) Notwithstanding the provisions of paragraph (1) of this article, the Courts of the State in which an arrest has been effected, or security given to prevent arrest or obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

(3) In cases where a Court of the State where an arrest has been effected or security given to prevent arrest or obtain the release of the ship:

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph (2) of this article,

such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

(4) If proceedings are not brought within the period of time ordered in accordance with paragraph (3) of this article then the ship arrested or the security given shall, upon request, be ordered released.

(5) If proceedings are brought within the period of time ordered in accordance with paragraph (3) of this article, or if proceedings before a competent Court in another State are brought in the absence of any such order, then unless such proceedings do not satisfy general requirements in respect of due process of law, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security given in order to prevent its arrest or obtain its release.

(6) Nothing contained in the provisions of paragraph (5) of this article shall restrict any further effect given to a foreign judgement or arbitral award under the law of the State where the arrest of the ship was made or security given to prevent its arrest or obtain its release.

Article 8
Application

(1) This Convention shall apply to any seagoing ship, whether or not that ship is flying the flag of a State Party.

(2) The Convention shall not apply to ships owned or operated by a State and used only on Government non-commercial service. (See 1993 MLM Convention, article 13 (2)).

(3) Nothing in this Convention shall be construed as creating a maritime lien.

(4) This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

(5) This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

(6) Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.

(7) Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person who has his habitual residence or principal place of business in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9
Reservations

A State may, when signing, ratifying, accepting or acceding to this Convention, reserve the right to refrain from applying the Convention to ships not flying the flag of a State Party.